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U. S. DISTRICT COURT
EASTERN DISTRICT OF MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THOMAS C. TOENISKEOTTER, et al.,

Plaintiff(s),

Vs.

GCS CONSTRUCTION & MANAGEMENT,
CO., INC. et al.,

Defendant(s).

Case No. 4:98CV233 TIA

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's Motion for Partial Summary Judgment. The undersigned has jurisdiction over this cause pursuant to 28 U.S.C. § 636(c).

Plaintiffs are trustees of the Cement Masons Local 527 Pension Fund and the Cement Masons Local 527 Welfare Fund. In Count I of their Complaint[1], plaintiffs seek damages from GCS Construction & Management Co., Inc., in the form of delinquent contributions to the Funds, as well as liquidated damages, interest, attorney fees, and costs, in accordance with the provisions of the Employee Retirement Income Security Act, 29 U.S.C. 1132, the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and the collective bargaining agreement between the Cement Masons and defendant. Additionally, plaintiffs pray that the Court order GCS to submit all future reports and payments in a timely fashion.

Discussion

Plaintiffs filed suit on February 6, 1998, seeking the monthly reports of contributions required by the collective bargaining agreement and an audit of defendant's records, as well as delinquent contributions to the funds, liquidated damages, interest, costs, and fees. Subsequent to the filing of plaintiffs' Complaint, the accounting firm of Wolfe, Nigles and Nahorski conducted an audit of defendant's records. Approximately four weeks later, defendant submitted to plaintiffs' counsel its contribution reports for the period of September 1997 to July, 1998. The reported hours were substantially less than the hours reflected by the audit, which covered the period of September 27, 1997 to February 28, 1998. Defendant paid plaintiff $3,080.73, in accordance with the amount owed based on the report rather than the audit.

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[1] Plaintiff's Motion for Partial Summary Judgment does not address Counts II and III, which seek damages from defendant Randy Green.

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Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. There is no dispute as to the validity or the terms of the collective bargaining agreement. Defendant contests plaintiffs' Motion for Summary Judgment, however, asserting that its payment of $3,080.73 satisfies its obligations for the time period in question. Defendant challenges the audit because it includes many hours of non-masonry work, which defendant contends is outside the scope of the collective bargaining agreement.

Defendant's argument is without merit. The collective bargaining agreement, at sections 7.06 and 7.07, requires defendant to make contributions for each actual hour worked by each employee covered by the agreement. The agreement defines employee (section 1.01) as a person empoloyed by the employer with a job classification of, or performing labor as, a cement mason or a cement mason apprentice. Both of the employees whose hours were included in the audit, Gary Green and Richard Kimbrel, were members of the Cement Masons Union during part of the relevant time period, and did at least some masonry work. The Ninth Circuit has ruled that where an employee splits his time between work covered by a collective labor agreement and non-covered work, the employer must contribute for all hours worked or paid. Waggoner v.

Dallaire, 649 F.2d 1362, 1369 (9th Cir. 1981). The Eighth Circuit has not determined the extent of an employer's contribution liability for split-time employees, but several courts in this district have arrived at the same conclusion as the Waggoner court. See Beetz v. Kokesh & Son, Inc., 4:95CV2045 JCH (E.D.Mo., April 26, 1996); Greater St. Louis Construction Laborers Welfare Fund, et al. v. A.W. Schnur Construction Company, No. 83-371(3), (E.D.Mo., November 30, 1983); Summers, et al. v. Jordan, et. al., No. 89-116C(1), (E.D.Mo., October 14, 1992). Accordingly, defendant is liable for the delinquent contributions, as set out in the audit, and the undersigned will enter judgment in favor of plaintiffs.

502(g)(2) of ERISA, codified at 29 U.S.C. §1132(g)(2), entitles plaintiffs to damages in the form of unpaid contributions, interest on the unpaid contributions, liquidated damages, fees, and costs. In accordance with the audit, plaintiffs seek $8,649.94 in unpaid contributions to the Pension Fund and $7,873.15 in unpaid contributions to the Welfare Fund. Additionally, the collective bargaining agreement provides that plaintiffs are entitled to liquidated damages of 10%, i.e. $864.99 for the Pension Fund and $787.34 for the Welfare Fund. The interest on the delinquent contributions, according to plaintiffs' undisputed calculations, is $699.61. Plaintiffs incurred $670.00 in attorney fees, $292.86 in court costs, and $648.00 for the cost of the audit. Thus, plaintiffs' total damages are $20,485.89.

ORDER AND JUDGMENT

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' Motion for Summary Judgment (#22) is **GRANTED.**

IT IS FURTHER ORDERED that Judgment be entered in favor of plaintiffs and against defendant GCS Construction and Management Co., Inc. in the amount of $20,485.89.

TERRY I. ADELMAN
UNITED STATES MAGISTRATE JUDGE

Dated this 19th day of May, 1999.

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UNITED STATES DISTRICT COURT - EASTERN MISSOURI
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4:98cv233 Toeniskoetter vs GCS Construction

29:1132 E.R.I.S.A.-Employee Benefits

Greg Campbell - 2774	Fax: 314-727-6804
Todd Hendrickson - 6769	Fax: 314-721-4944
C. Lozano - 33128	Fax: 314-721-4944
Richard Welch - 71456	Fax: 314-727-6804

E